CELCOM (MALAYSIA) BHD

v.

INMISS COMMUNICATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[ORIGINATING SUMMONS NO: D3-24-197-2002]
10 MARCH 2003

CIVIL PROCEDURE: *Injunction - Erinford injunction - Principles and considerations in granting - Whether status quo should be preserved pending appeal - Integrity of appeal - Balance of convenience - Whether damages an adequate remedy - Whether Erinford injunction may still be granted to restrain a winding-up petition after it has been filed*

COMPANY LAW: *Winding-up - Injunction to restrain petition - Application for injunction to restrain filing of petition dismissed - Application for Erinford injunction to restrain winding-up pending appeal - Principles and considerations in granting - Whether status quo should be preserved pending appeal - Whether Erinford injunction may still be granted to restrain a winding-up petition after it has been filed*

This was the plaintiff's application to the High Court for an Erinford injunction to restrain the defendant from taking any further steps to wind up the plaintiff pending the hearing of the plaintiff's appeal to the Court of Appeal against an earlier decision of the High Court (same judge) dismissing the plaintiff's application for an injunction to restrain the defendant from filing a winding-up petition against the plaintiff.

Held:

[1] Although the court had earlier dismissed the plaintiff's application for an injunction, it was still seized of the jurisdiction to entertain the plaintiff's instant application for an Erinford injunction pending its appeal to the Court of Appeal. The judicial considerations in respect of the plaintiff's application for an Erinford injunction to restrain the defendant from taking any further steps to wind up the plaintiff were different from those in respect of the plaintiff's earlier application for an injunction to restrain the defendant from filing a winding-up petition against the plaintiff. ("A judge who feels no doubt in dismissing a claim

to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal." Per Megarry J, *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448 @ 454.) (p 87 b-g)

[2] The *status quo* between the plaintiff and the defendant should be preserved pending the determination of the plaintiff's appeal to the Court of Appeal. This should preserve the integrity of the appeal so that it would not be rendered nugatory. The balance of convenience was thus in favour of granting the Erinford injunction sought by the plaintiff. Furthermore, it would appear that whilst the defendant's claim could ultimately be satisfied by way of damages, any loss or damage to the plaintiff would be beyond monetary compensation. (p 89 b-d)

[3] An Erinford injunction may still be granted to restrain a winding-up petition notwithstanding the fact that it has been filed. (p 89 h)

[Erinford injunction granted.]

Case(s) referred to:

Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(dist)***

Bina Satu Sdn Bhd v. Tan Construction [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(foll)***

Ng Kong You & Anor v. MBf Property Services [2001] 5 MLJ Supp 122 FC ***(dist)***

Vijayalaskhmi Devi Nadchatiram v. Dr Mahadevan & Ors [1995] 3 CLJ 493 FC ***(refd)***

For the plaintiff - Ong Chee Kwan; M/s Lee Ong & Kandiah
For the defendant - Paul Ong (SS Tieh & Olivia Ho); M/s SY Lim

Reported by Gan Peng Chiang

JUDGMENT

Zulkefli Ahmad Makinudin J:

This is the plaintiff's application (encl. 22) for an Erinford injunction to restrain the defendant from taking further steps in Winding Up Petition No. D3-28-1134-2002 ("the petition") pending the hearing of the plaintiff's appeal to the Court of Appeal against the decision made by this court on

15 November 2002 in dismissing the plaintiff's application for an injunction to restrain the defendant from filing a winding-up petition against the plaintiff (encl. 3).

Although I had earlier dismissed ,the plaintiff's application under encl. (3), it is my view that I would still have the jurisdiction to hear this application for an erinford injunction and to grant the same. The consideration for the granting of the erinford injunction is different from the consideration under application in encl. (3) and there is nothing inconsistent for me to grant the prayers under encl. (22) notwithstanding the decision dismissing encl. (3). For this proposition I would like to refer to the case of *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448 wherein his lordship Megarry J had stated most succinctly the basis for such jurisdiction to grant an injunction pending appeal at p. 454 as follows:

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal. I cannot see that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction or that by refusing an injunction pending the trial the judge becomes *functus officio* quoad granting any injunction at all.

Based on the aforesaid principles applicable for an erinford injunction, it is my view that the plaintiff's application herein should be allowed for the following reasons:

1. The defendant's purported claim is for a sum of RM17,702,019.79 allegedly being the balance outstanding amount for services rendered pursuant to a Service Provider Agreement dated 30 May 1997. The claim is nothing more than a monetary claim which is being disputed by the plaintiff. There is no evidence that the plaintiff is not financially able to pay if indeed it is subsequently found that the said amount is due;

2. The plaintiff is a public listed company with the Kuala Lumpur Stock Exchange ("KLSE"). It is currently undergoing a merger exercise with TM Cellular Sdn Bhd and upon completion of the same, the plaintiff will have the largest number of subscribers for mobile phones in the country. The filing of the petition will have an adverse impact on its shares and the public perception of the company. The plaintiff as a public listed company is also subject to constant monitoring and supervision by the KLSE and the Securities Commission. The plaintiff is under a duty to apprise the KLSE of the petition at every stage and the plaintiff will have to face likely media attention and speculation arising from the petition. Such consequences cannot be quantified in monetary terms and cannot be compensated. The public interest is a relevant and important factor for consideration as correctly held by his lordship Mohamed Dzaiddin FCJ (as he then was) in the Federal Court case of *Viiavalaskhmi Devi d/o Nadchatiram v. Dr. Mahadevan & Ors*. [1995] 2 MLJ 709 wherein he stated *inter alia*, "... in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large ...;

3. The filing of the petition constitutes an event of default in the facilities agreement between the plaintiff and its financiers. In particular, the plaintiff has recently completed a restructuring exercise involving a sum of RM1.8 billion and in the process saving the company a substantial amount of monies. However, with the filing of the petition, the plaintiff is now in default of the agreement and is now at the mercy of its financiers as to whether the facilities would be recalled. In the event this occurs, the entire organization of the plaintiff will be adversely affected. This is a real possibility and would affect all its shareholders and all of the KLSE market as well. The plaintiff owes a responsibility both legally and morally to its subscribers and the public to ensure that its services are not affected;

4. The petition will also have an impact on the proposed merger between the plaintiff and TM Cellular Sdn Bhd for obvious reasons as no entity would be prepared to merge with another if the latter is the subject matter of a winding up petition. The plaintiff had already obtained all relevant approvals for the merger and has made the announcement to the market. The petition based on a disputed sum should not be allowed to proceed and thwart the merger plans.

It is my view that the *status quo* should be preserved pending the determination of the plaintiff's appeal. This is to ensure that the integrity of the appeal is preserved and the same is not rendered nugatory. In this regard, the *status quo* is the position of the plaintiff and the defendant immediately before the filing of the originating summons and encl. (3) by the plaintiff. The status at that time is that there is no winding up petition filed against the plaintiff. The balance of convenience is in favour of granting the erinford injunction. Clearly, the defendant's claim can be compensated by monetary payment. The contrary is not true for the plaintiff. If an erinford injunction is not granted, the loss and damages to the plaintiff will be beyond monetary compensation. Damages is not an adequate relief to the plaintiff.

As regards the two cases of *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 and *Ng Kong You & Anor. v. Mbf Property Services Sdn Bhd* [2001] 5 MLJ 122 cited by learned counsel for the defendant to support his contention that an erinford injunction cannot be granted by this court once the winding up petition has been filed, I could not agree with such a contention. In *Azman & Tay Associates Sdn Bhd*'s case the learned judge was dealing with an application for an injunction to restrain from advertising or otherwise publishing the existence or contents of a winding up petition. Similarly in the case of *Ng Kong You & Anor*. the learned judge there was also dealing with an application for an injunctive order to restrain, the petitioners from advertising the petition. Both these two cases are not cases of an erinford injunction restraining a winding up petition from proceeding pending the hearing of the appeal of an application to restrain the filing of the winding up petition. The facts of the said two cases are clearly distinguishable from the present case.

It is my view that the court certainly has jurisdiction and powers to grant an injunction to restrain a winding up petition notwithstanding the fact that the petition has already been filed. This is clear from the case of *Bina Satu Sdn Bhd v. Tan Construction* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 where his lordship VC George J (as he then was) *inter alia* had this to say:

Section 23(2) of the Courts of Judicature Act 1964 provides confirmation that the court continues to enjoy its inherent powers. This includes the power to restrain any abuse of its proceedings. A classic illustration of the abuse of the court proceedings is provided in Re A Company where it was held that where a petition against a company is presented ostensibly for a winding up order but in reality for another purpose such as to bring to bear on the company, the court has an inherent jurisdiction to prevent such an abuse of process and will do so by injunction. In *Cadiz Waterworks Co v. Barnett* it was for the same reason held that the creditor of a solvent company whose debt is *bona fide* disputed will be restricted from presenting a petition for winding up the company.

For the above stated reasons and in the exercise of my discretionary powers I hereby allowed the plaintiff's application. The cost of this proceedings shall be costs in the cause.